Office-Supreme Court, U.S.
FILED
AUG 14 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-115

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

and

MAKAH INDIAN TRIBE,
Plaintiff-Intervenor/Petitioner,

v.

LOWER ELWHA TRIBE
Plaintiff-Intervenor/Respondent,

v.

STATE OF WASHINGTON, et al.,
Defendants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EVERGREEN LEGAL SERVICES
Native American Project
By: PHILLIP E. KATZEN
ALLEN H. SANDERS
Attorneys for Respondent

Office and P.O. Address:
520 Smith Tower
506 Second Avenue
Seattle, Washington 98104
(206) 464- 5888

August 12, 1981

TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE CASE	1
	A. Procedural History	1
	B. Statement of Facts	6
II.	SUMMARY OF ARGUMENT	16
III.	ARGUMENT.	17
	A. The Findings of The District Court Are Supported by Substantial Evidence And Are Not Clearly Erroneous . . .	17
	B. The Extent Of Reserved Treaty Rights To Take Fish At Usual And Accustomed Fishing Grounds Must Be Determined As Of The Time Of The Treaty.	21
IV.	CONCLUSION	30

TABLES OF AUTHORITY

Table of Cases

Jones v. Meehan, 175 U.S. 1 (1899) 23

Makah Tribe of Indians v. United States, 23 Ind.Cl.Comm. 165 (1970) aff'd, 195 Ct.Cl. 539 (1971) . . . 21

Page

S'Klallam Tribe of Indians v. United States, 5 Ind.Cl. Comm. 680 (1957) 15, 16, 20, 21

United States v. Top Sky, 547 F.2d 486 (9th Cir. 1976) 26

United States v. Washington, 384 F.Supp. 312 (W.D.Wash. 1974) 7, 24, 25, 26, 29

United States v. Winans, 198 U.S. 371 (1905) 22

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 22, 23 29

Statutes

Treaty of Point No Point 12 Stat. 1933 22

Rules and Regulations

Fed.R.Civ.P. 52(a) 18

Fed.R.Civ.P. 60(b)(2) 4

Supreme Court Rule 34.2 2

Other Authority

J.Swan, Almost Out of the World: Scenes From the Washington Territory, The Straits of Juan de

Page

Fuca, 1859-1861 . . . . . 12, 13

B.Lane, Report on Lower Elwhas, 10, 11
Ex. U.S. 91 15

B.Lane, Report on the Makahs, 10, 11
Ex. U.S. 21 16

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

and

MAKAH INDIAN TRIBE,
Plaintiff-Intervenor/Petitioner,

v.

LOWER ELWHA TRIBE
Plaintiff-Intervenor/Respondent,

v.

STATE OF WASHINGTON, et al.,
Defendants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE[1/]

A. Procedural History

The District Court found five rivers

1/ The Lower Elwha Tribe finds it necessary to
(footnote continued on next page)

to be within the usual and accustomed fishing grounds of both the Lower Elwha Tribe and the Makah Tribe. This dispute concerns the respective rights of the two tribes to control fishing on four of those rivers. After two evidentiary hearings and two separate proceedings, the District Court rejected the claims of the Makah Indian Tribe.

After determination of the Lower Elwha usual and accustomed fishing grounds,[2/] the Makah Tribe requested that a determination be made that Lower Elwha fishing in all rivers also within Makah

---

supply a new Statement of the Case because of the omissions and inaccuracies of the Petitioner. Supreme Court Rule 34.2. The Makah Tribe's Statement of the Case not only fails to mention the evidence relied upon by the courts below, it contains repeated conclusions, statements and inferences which are not, and can not be supported by the record.

2/ Order Re Herring Fisheries and Determination of Usual and Accustomed Fishing Places of Additional Tribes, 459 F.Supp. at 1048, 1049, Appendix A-21. [References to the Appendix refer to the Appendices of the Petition for Writ of Certiorari.]

usual and accustomed areas be subject to Makah permission. Motion for Preliminary Injunction, filed October 7, 1975, Docket Number 1453. Evidence regarding this claim was presented in hearings held on July 30 and August 6, 1975. After those hearings the Makah Tribe abandoned its claim that it could prohibit Lower Elwha fishing on rivers within Lower Elwha territory (the Elwha, Lyre, Twin and Pysht Rivers), and then claimed an equal right to fish on those rivers.

The Makah Tribe maintained its claim to control fishing on the Hoko River and the Sekiu River. The Lower Elwha Tribe took the position that it controlled the rivers east of the Hoko, and that the Hoko was a joint use area.

The court concluded that the Makah Tribe controlled fishing in the Sekiu River (this had never been challenged by the Lower Elwha Tribe), that the Hoko

River was a joint use area, not subject to either tribes' control, and that all rivers east of the Hoko were controlled by the Lower Elwha Tribe. It further limited the eastward boundary of the Makah usual and accustomed fishing grounds to exclude the Elwha River (which flows through the Lower Elwha Reservation). Order Re Makah Tribe's Request for Reconsideration of Lower Elwha Usual and Accustomed Fishing Places, 459 F.Supp. 1066-1068 (W.D.Wash., March 10, 1976) (Appendix A-14).

Before the Makah Tribe's appeal of the district court's March 10, 1976 Order was heard, the Makah Tribe was granted a motion for a new hearing, pursuant to Fed.R.Civ.P. 60(b)(2), and the case was remanded. Appendix B-14. The basis for the motion was an allegation that substantial new archaeological evidence had been discovered to support the Makah claim

regarding the Hoko River. Makah Motion for Relief from Final Order, August 17, 1976, Docket Number 2353.

Two further days of hearings were then held, with an anthropology student, Mr. Dale Croes, testifying for the Makah Tribe, on November 29 and 30, 1976. The Makah Tribe was ordered to prepare proposed findings and conclusions for response by the Lower Elwha Tribe. When those had not been filed by August 22, 1978, the district court dismissed the Makah Motion for Relief from Judgment, with prejudice, for lack of diligent prosecution. Order Re Dismissal or Referral of Miscellaneous Pending Matters, August 22, 1978, Docket Number 4852, Appendix B-12.

The dismissal order was vacated at the request of the Makah Tribe. Appendix B-10. The court then denied a Makah request for yet another hearing and

entered its "Additional Findings of Fact and Conclusions of Law Re Makah v. Lower Elwha Dispute Re Hoko River," November 28, 1978. Docket Number 5378, Appendix B-1. The court reaffirmed its earlier rulings, holding that the archaeological evidence was neither conclusive nor persuasive. The court further held that Dr. Lane, who had presented evidence supporting Lower Elwha control over Makah fishing and the joint nature of fishing on the Hoko River, was a more credible witness than Mr. Croes.

The Makah Tribe then renewed its appeal before the Ninth Circuit Court of Appeals, which affirmed the district court's decision in all respects. 642 F.2d 1141 (9th Cir. 1981), Appendix B-1.

B. Statement of Facts

During the district court proceedings, both tribes, and the court, treated

this dispute as a pure issue of fact. Evidence produced by both tribes was directed at the question of control of the rivers at the time of the treaties. At the hearings both tribes relied upon the testimony of Dr. Barbara Lane, an anthropologist who had testified for the United States and the tribes during the original trial in United States v. Washington and in many subsequent proceedings. Regarding her testimony in these proceedings the court stated:

> "The testimony and reports of Dr. Barbara Lane have been found on numerous occasions to be highly credible and well researched and justify reliance thereon by the court."

Order Re Makah Tribe's Request for Reconsideration of Lower Elwha Usual and Accustomed Fishing Places, 459 F.Supp. 1067, Appendix A-14, 17-18.

The evidence provided by the Lower Elwha Tribe established that, at the time

of the treaties, Makah fishing on rivers east of the Hoko was based upon kinship or intermarriage with members of the Lower Elwha Tribe, that the Lower Elwha Tribe controlled fishing on those rivers, and that both tribes freely used the Hoko River without control by either tribe. Dr. Lane testified that she used four factors to determine control over a fishery: (1) proximity of population centers to the fishery; (2) frequency of use by and relative importance to a tribe of a given fishery; (3) contemporary Indian and non-Indian conceptions of control or territory; and (4) evidence of behavior consistent with the idea of control over the fishery. 642 F.2d at 1143, n.4. Mr. Croes, the Makah witness, essentially agreed with this test. (Tr. Nov. 29, 1976, pp. 101, 105; Nov. 30, 1976, pp. 30, 36). The court held that:

> The concept of territorial

> control with instances of permissive use, as asserted herein, is the generally accepted view of people concerned with ethnography of this area and is a conclusion supported by the evidence. (Tr. Aug. 6, 1975, pp. 151-171).

459 F.Supp. at 1067.

Evidence was presented with respect to each of the four factors, confirming Lower Elwha control of the rivers east of the Hoko and joint use of the Hoko. With respect to the proximity of population centers, the evidence showed that there were Klallam villages located "on all of the major streams" east of the Hoko River. Tr. Aug. 6, 1975, p.157. There was also evidence of a Klallam village on the Hoko River, although the exact nature of the village was not fully determined. Tr. Nov. 29, 1976, pp. 131-132.

The evidence established that the Lower Elwha relied much more heavily on salmon and steelhead than the Makah, and

that their primary source was the rivers, unlike the Makah. Salmon and steelhead were of only secondary importance to Makah, as a change of diet, because they relied primarily on halibut, and to a lesser extent, seal and whale. Ex. U.S. 21 at 11, 20, 32. 384 F.Supp. at 363, FF 61. When Makah did take salmon, they primarily used the ocean or the Strait of Juan de Fuca, not the rivers. Ex. U.S. 21 at 22-23.

On the other hand, salmon and steelhead taken from the rivers were the staple food for Lower Elwha. Ex. U.S. 91 at 10. Every Klallam river and stream had at least one salmon trap. Ex. U.S. 91 at 13.

Treaty time descriptions and conclusions regarding Klallam society also substantiated Lower Elwha control east of the Hoko. George Gibbs, a lawyer and ethnographer, and an observer and advisor to the commission which drafted the

treaties, identified the Hoko River as the site of a Klallam village, Ex. U.S. 91 at 5. Along with James Swan, an historian, he considered the Pysht, Lyre and Elwha Rivers to be within the Klallam domain. Ex. U.S. 91 at 3-8. The Makah Tribal Council, in a 1941 list of fishing sites prepared from information supplied by tribal members, identified the Sekiu and Hoko Rivers as being areas where fishing was done both in the river and off the mouth of the river in the Strait of Juan de Fuca. For the Lyre River area, however, fishing was listed only off the mouth, in the Strait, not in the river itself. No mention was made of other rivers east of the Hoko. Ex. U.S. 21 at 11 (the list is Appendix I to Dr. Lane's report).

Contrary to Petitioner's perceptions of the notorious incident described by

James Swan,[3/] that incident evidences behavior consistent with Elwha control and adds the final factor as support for the Elwha position. Swan describes his experience of being taken into Klallam territory by a small Makah party. He observed the increasing anxiety and fear of the Makah as the party proceeded eastward. One member of the party explained the cause of their uneasiness:

> ...[A] few years before, he had come up with a party of Mackahs to catch a salmon at this place [in Elwha territory].... The Elwhas were very insolent and refused to let them catch fish in their river. The Mackahs left, but during the night they returned, and while the Elwhas were asleep they attacked them, killing twelve men and taking prisoners all the women. They cut off their heads as trophies, and collecting the bodies together, covered them up with the boards and firewood, and made good their escape.

Id. at 90.

3/ In "Almost Out of the World: Scenes from the Washington Territory, the Straits of Juan de Fuca," 1859-61, pp. 86-90 (cited in Ex. U.S. 21 at 20.)

Although the Lower Elwha were murdered for refusing permission to fish, their refusal was honored in fact, as the Makah fled from the scene, rather than remain and fish. Their fear in returning to the area years later further showed their understanding that they were not free to fish those waters as a matter of right. As described by Swan, the Makah's fear was so great that they would not camp where they would be seen by Elwhas and would not permit fires to be built. Id. at 89, 91. Both Dr. Lane and, prior to the Petition for Certiorari, counsel for the Makah, have interpreted this incident as meaning that the Klallams "evidently refused some permission to fish" in the stream. Tr. Aug. 6, 1975, pp. 169-170.

Dr. Lane examined the evidence described above, as well as all the other evidence, drew upon her extensive exper-

tise in the customs and history of the Stevens treaty tribes, and concluded that the Lower Elwha controlled the rivers east of the Hoko. Tr. Aug. 6, 1975, pp. 157-162. From the determination of who used, occupied and controlled the rivers, she further defined the territory of the Lower Elwha Tribe. Tr. Aug. 6, 1975, p.153. In other words, contrary to Petitioner's claim, her definition of territory depended upon who exercised control in any given area; control of fishing did not depend on territory.

Dr. Lane found that the area east of the Hoko River was Lower Elwha territory, the area west of the Hoko River was Makah territory, and that the Hoko River was the boundary between the two. Dr. Lane concluded that Makah fishing in Lower Elwha territory resulted from kinship, intermarriage, or permission. She drew a similar conclusion regarding Klallam

rights in the Sekiu, where the Makah had urged the district court to find that they controlled the fishing. Tr. Aug. 6, 1975, p.159, 162.

In addition to the evidence regarding control, evidence was also presented which established the practice of intermarriage between Lower Elwha and Makah. Dr. Lane testified that "Makah women very often married Clallam men," Tr. Nov. 30, 1976, p.42, and "there has been for several generations intermarriages between Clallam and Makah," Tr. Nov. 19, 1976, p.130.

Finally, the evidence established that both Makah and Lower Elwha were powerful tribes. In 1854, George Gibbs described the Klallam as "the most formidable tribe now remaining," Ex. U.S. 91 at 5, and an historian, Waterman, described the Klallam as "more vigorous than the tribes on Puget Sound," S'Klallam

Tribe of Indians v. United States, 5 Indian Claims Commission 680, 684 (1957). The Makah also being a powerful tribe, with a reputation for being fierce and difficult, Ex. U.S. 21 at 26, relations between the tribes were at time unfriendly. Ex. Mk-2.

II. SUMMARY OF ARGUMENT

There are three primary reasons why certiorari should not be granted. First, the real dispute in this case is over findings of fact for which there is substantial evidence. Second, there is no error of law because the court based its determination of control over fishing upon the evidence, not a presumption, and because tribal rights to control fishing inter se must be determined under the reserved rights doctrine as of the time of the treaties. Finally, no substantial federal question over which federal courts

are in disagreement is presented by this essentially factual dispute.

III. ARGUMENT

A. The Findings Of The District Court Are Supported By Substantial Evidence And Are Not Clearly Erroneous.

The primary contention of the Petitioner Makah Tribe is that the district court was incorrect in determining that, at treaty times, the Lower Elwha Tribe controlled fishing east of the Hoko River and that both tribes had a joint fishery on the Hoko River. At two separate proceedings in the district court the Makah Tribe attempted to present evidence regarding the respective rights of the tribes at treaty times. This factual question was resolved against them in the district court, despite their repeated opportunities to show otherwise. That factual determination may not be set aside

unless it is shown to be clearly erroneous. Fed.R.Civ.P. 52(a). The Court of Appeals found that the factual determination was supported by substantial evidence and not clearly erroneous. 642 F.2d 1141, 1143; Appendix A-1, 9.

The Makah Petition's Statement of the Case and Argument are devoted to a large extent to challenging the Findings of Fact of the district court. For example, the Makah Petition states "No finding was made, nor evidence presented in the underlying case, that the Makahs fished these rivers or set up their fall camps in any way other than freely and by virtue of right." Petition, pp. 9-10. This ignores the evidence supplied by Dr. Lane, and the findings of the court, that any Makah fishing there was not as of right, but by kinship, intermarriage or permission. Tr. Aug. 6, 1975, pp.159, 162; 459 F.Supp. 1066, 1067, Appendix A-

14, 18. At page 12 of the Petition, the Makah argue that certain factors "demonstrate that fishing on the Hoko was subject to the influence or control of the Makahs," citing the testimony of Dale Croes, Tr. Nov. 29, 1976, pp. 100-101, 105. The district court found that

> on the question at issue in this proceeding, namely control over treaty-time fishing at the Hoko River, the testimony of Dr. Lane is more credible and convincing than that of Mr. Croes.

Order of Nov. 28, 1976, Appendix B-2, 4. Dr. Lane testified that she saw "no evidence" that suggested that the Makahs had a right to exclude the Klallams from the Hoko River, and that

> ...if there is any preponderance one way or the other I am afraid it would be Clallam, not Makah.

Tr. Nov. 29, 1976, at 131-132.

The Makah Petition tries to sidestep the "clearaly erroneous" standard by asserting that the district court relied

upon an "anthropological principle" as an irrebuttable presumption, rather than on any specific facts. They argue that the court irrebuttably presumed control of the rivers from the fact that the rivers (east of the Hoko) were within Lower Elwha territory, characterizing the district court's holding as the alleged principle that "occupancy of territory means total control of fisheries." Petition, p.33.

Despite this "quotation," which is made without reference to its origins, neither the court nor Dr. Lane ever made that statement. The court and Dr. Lane's definition of a tribe's territory was based upon the evidence of which areas it controlled. This definition is in full accord with the rulings of the Indian Claims Commission that a condition precedent to a determination of a tribe's territory is evidence of sole control of the area. S'Klallam Tribe v. United

States, 5, Ind.Cl.Comm. 680, 703 (1957). Both that case and Makah Tribe of Indians v. United States, 23 Ind.Cl.Comm. 165 (1970), aff'd, 195 Ct.Cl. 539 (1971), found that the Hoko River was the boundary between the two tribes' territories, with Klallam territory extending to the east, and Makah to the west.

The ruling of the lower court on these factual questions was not clearly erroneous and no important federal question is presented. The determinations made below are consistent with previous rulings and not in conflict with any previous decision of this court or any other court.

B. The Extent Of Reserved Treaty Rights To Take Fish At Usual And Accustomed Fishing Grounds Must Be Determined As Of The Time Of The Treaty.

The Makah Tribe attempts to use post-

treaty evidence to determine the relative rights of the tribes in the disputed rivers. To do so would deprive the Lower Elwha Tribe of the vested rights it reserved in the Treaty of Point No Point, 12 Stat. 1933. It would also work a change in the long-standing rules governing this case and the determination of usual and accustomed areas, and in the law of reserved treaty rights generally.

There is no disagreement that the right to take fish at all usual and accustomed fishing grounds was not granted to the tribes, but rather reserved by them. United States v. Winans, 198 U.S. 371, 381 (1905); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685 (1979). The question to be answered is, what were the rights that were reserved?

Treaties with Indian tribes must be construed "in the sense in which they

would naturally be understood by the Indians." Passenger Fishing Vessel, 443 U.S. at 676, quoting Jones v. Meehan, 175 U.S. 1, 11 (1899). At the time of the treaties, Makah fishing east of the Hoko was by permission or due to intermarriage with Klallams. On the Hoko, the Elwhas fished freely with the Makahs. As the Ninth Circuit said:

> We may infer that the tribes reasonably understood themselves to be retaining no more and no less of a right vis-a-vis one another than they possessed prior to the treaty.

642 F.2d at 1144 (footnote omitted).

The Lower Elwha Tribe never contemplated that by signing the treaty it was opening up rivers it had controlled to unlimited fishing by the Makahs, or that it could be excluded from a river it had always fished freely in common with the Makahs. As the district court recognized in its original decision, 384 F.Supp. at

357, FF 26, the tribes did not expect to give up control over fisheries by signing the treaties:

> 26. There is nothing in the written records of the treaty councils or other accounts of discussions with the Indians to indicate that the Indians were told that their existing fishing activities or tribal control over them would in any way be restricted or impaired by the treaty.

The Makah Tribe has never challenged this finding.

The entire litigation of United States v. Washington has explicitly recognized that, as to matters involving usual and accustomed fishing grounds, the rights of the tribes were fixed as of the time of the treaty. Conclusion of Law Number 20, 384 F.Supp. at 401, states:

> The right secured by the treaties to the Plaintiff tribes is a reserved right, which is linked to the marine and freshwater areas where the Indians fished during treaty times,....

Also:

> ...the areas identified in the Findings of Fact herein for each of the Plaintiff tribes in general describe some of the freshwater systems and marine areas within which the respective tribes fished at the time of the treaties and wherein those tribes, as determined above, are entitled to exercise their treaty fishing rights today.

384 F.Supp. at 402, CL 26.

The establishment of usual and accustomed fishing grounds depends upon a showing of the areas customarily fished at treaty times. No party has ever disputed that ruling. After approximately 20 different determinations of tribal usual and accustomed fishing areas, including the original determination of the Makah areas on this basis, it is now rather late for the Makah Tribe to claim that the reservation of such rights can be changed by post-treaty tribal activities.

The district court has also, in other situations, upheld the concept of tribal control over fishing by members

of another tribe, where those members' fished due to kinship with the controlling tribe. In 1974, the district court held that Indians' rights in their natal territory, or in territories where they had consanguineal kin, were permissive use rights. 384 F.Supp. at 353, FF 12. The Lummi Tribe later established its right to control fishing by the Swinomish Tribe in one area, based upon that relationship at treaty times. 459 F.Supp. at 1049, para. 7.

The Makah Tribe does not point to any inconsistent decisions from other federal courts to support its Petition in this regard. In at least one case, United States v. Top Sky, 547 F.2d 486 (9th Cir. 1976), the extent of rights reserved by an Indian treaty was explicitly decided upon the basis of treaty time practices and customs. In that case the court limited a treaty reserved right to hunt

eagles because of historical evidence showing that sales of eagle parts was deplored by the Indians. The court held that no right to sell eagles had been reserved.

To now abandon treaty times as the standard for measuring rights to fish in usual and accustomed areas invites chaos. Without a fixed point of reference, there could never be a final determination of any tribe's areas or rights in those areas. They would always be open to the claim that circumatances had changed, and that a previous decision must be adjusted. The Makah Tribe suggests no reason why 1981 is a more appropriate date to determine these rights than 1854, or, for that matter, 2001, 1974 or any other date.

The Makah Tribe argues that after the treaty the Lower Elwha Tribe "drifted away from fishing towards agriculture, industrial and other pursuits associated

with non-Indian economy." Petition, p.17. The Makah Tribe apparently seeks to profit from the misfortune of the Lower Elwha people who were viciously excluded from their traditional fishing grounds. Unlike the Makah, the Lower Elwha Tribe was unfortunate in being located near an area non-Indians soon coveted for themselves. The effects of non-Indian settlement had a greater impact on them than on the much more isolated Makah. But this court has recognized that such factors can not serve to deny fishing rights Indian people believed they were securing by the treaties:

> The impact of illegal regulation... and of illegal exclusionary tactics by non-Indians... in large measure accounts for the decline of the Indian fisheries during this century and renders that decline irrelevant to a determination of the fishing rights the Indians assumed they were securing by initialing the treaties in the middle of the last century.

Passenger Fishing Vessel, 443 U.S. at 669, n. 14.

At the time of the original decision in United States v. Washington in 1974, the Tribes were collectively taking approximately 2% of the fish in the case area. 459 F.Supp. 1032; 443 U.S. at 676-677, n.22. A great number of tribes were obviously forced to rely upon any work they could find during the time they were illegally excluded from their traditional fisheries. The Makah Tribe should no more profit from that circumstance than non-Indians.

Finally, the Makah Tribe argues that to permit the Lower Elwha Tribe to control Makah fishing on any river is inconsistent with the finding that the river is a usual and accustomed fishing ground of the Tribe. Petition, p.47. That argument misses the point. The question is under what circumstances was fishing

conducted on rivers within both tribes' usual and accustomed areas. The argument rings somewhat hollow, as well, because the Makah Tribe excludes the Lower Elwha Tribe from the Sekiu River, which is an Elwha usual and accustomed area subject to Makah control, and Makah seeks the same status for the Hoko River.

IV. CONCLUSION

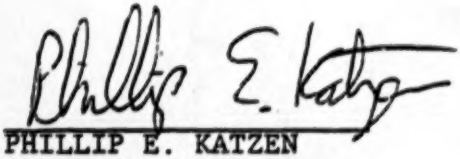
The district court and the Court of Appeals followed well-established rules of law to interpret Indian treaty rights and to determine the extent of those rights. The Petitioner has shown no inconsistency with the decisions of this court, any other court or prior decisions of the district court in this lengthy litigation. The Petitioner seeks to change these well-settled rules.

The real dispute is over the district court's findings of fact regarding Lower

Elwha control of Makah fishing at treaty times. Those findings are supported by substantial evidence and not clearly erroneous.

The Petition for a Writ of Ceriorari should be denied.

Respectfully submitted, August 12, 1981.



PHILLIP E. KATZEN
ALLEN H. SANDERS
Attorneys for
Respondent